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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 742

TRANSIT CASUALTY COMPANY, et al.,
Petitioners,

v.

SECURITY TRUST COMPANY, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

Transit Casualty Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on June 28, 1968.[1]

[1] In addition to Transit Casualty Company, the following parties are petitioners: Charter National Insurance Company; American Mutual Liability Insurance Company; Dorchester Insurance Co. Ltd.; Farmers Elevator Mutual Insurance Company; Agway Insurance Company; LaSalle Casualty Company; Mid-America Fire & Marine Insurance Company; and Mutual Boiler and Machinery Insurance Company.

In addition to Security Trust Company, the following are respondents: The State Treasurer and, ex officio, Insurance Commissioner of the State of Florida, substitute Receiver of McKinley & Company; The Deputy Insurance Commissioner of the State of Florida, deputy Receiver of McKinley & Company.

CITATIONS TO OPINIONS BELOW.

No opinions were rendered by the District Court. The opinion of the Circuit Court of Appeals printed in the Appendix hereto, *infra*, p. A-1, is reported in 396 F. 2d 803. The *uncorrected* opinion of the Circuit Court of Appeals on petition for rehearing and on motion for modification and clarification and for rehearing en banc is reported in 399 F. 2d 665 and is not printed in the Appendix. The *corrected* opinion of the Circuit Court of Appeals on petition for rehearing and on motion for modification and clarification and for rehearing en banc printed in the Appendix hereto, *infra*, p. A-2-3, is not yet reported in the Federal Reporter.

JURISDICTION.

Judgment of the Circuit Court of Appeals was entered on June 28, 1968. CCA-R. 448[2]; p. A-4-5, *infra*. Rehearing was denied on August 29, 1968. CCA-R. 513; p. A-2-3. The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1) the pertinent portion of which is as follows:

> "Cases in courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . ."

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[2] "CCA-R." references refer to the folios in the record of proceedings before the Circuit Court of Appeals, designated by that court as Transcript of Record, Volume V; "R." references refer to the folios in the record of proceedings before the District Court, nine copies of which have been filed herewith.

QUESTIONS PRESENTED.

1. Where parties sue for recovery of damages on their own behalf and on behalf of others similarly situated, can the lower court, without denying due process, enter a final dismissal for non-joinder of the only non-diverse persons in the class (three Florida companies) before making the mandatory determination of the maintainability *vel non* of the suits as class actions, as required under Rule 23 (c) (1), where joinder before the making of such determination would destroy federal jurisdiction but after such determination would not; and, particularly where the statute of limitations has run so as to be a bar to any future suit?

2. Under the above circumstances, is due process denied the parties of record whose claims, pleaded independent of those of the class, are also foreclosed by the dismissal; particularly where there is no finding, and there can be no finding, that the persons whose joinder the lower court sought to enforce are indispensable for any purpose in either the class action or with respect to the claims independent thereof?

3. In an action by Petitioners on their own behalf and on behalf of others as a class, where the lower court, acting pursuant to Rule 23 (c) (2), officially notified all members of the class that:

a. "You have an interest in the outcome of this litigation," and

b. "The judgment whether favorable or not in this litigation, will include all members who do not request exclusion," and

where pursuant to and in compliance with such notice, 1551 members of the class (including the three Florida companies) elected to be included as class members, with-

out actively participating as parties, does not an order of final dismissal (after bar by limitations and without the mandatory notice to the class, as required under Rule 23 (e)), amount to a denial of due process?

4. Where the manner in which amended Rule 23 was construed by the district court and sanctioned by the court of appeals violates each and every mandate contained in that Rule and patently disregards the use of other Federal Rules of Civil Procedure as a means of preserving the rights of a class; and, the sole basis for dismissing these class actions is without precedent in American jurisprudence and is in direct conflict with the principles contained in a controlling decision of this Court,[3] which states the proper manner of construing federal Rules, should not this Court invoke its jurisdiction and exercise its supervisory powers to review the proceedings below?

STATUTES AND RULES INVOLVED.

The statute involved is 28 U. S. C., § 1254 (1), only the pertinent portion of which was printed, *supra*, p. 2. The rules involved are the Federal Rules of Civil Procedure numbers 1, 19, 20, 23, 41 and 86.

STATEMENT.

Petitioners, on behalf of various corporations and individuals,[4] filed two class actions in January and February, 1966, in the United States District Court for the Southern

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[3] *Provident Tradesmens Bank and Trust Co. v. Patterson*, ... U. S. ..., 19 L. Ed. 2d 936, 88 S. Ct. .... (1968).

[4] By leave of court (R. 209, 210), the complaints were amended to enlarge the class from the 26 original corporations to 39 corporations and 1,521 individuals (R. 193-196). Respondent answered the amendments to the complaints on November 1, 1966 (R. 213).

District of Florida, Miami Division, to recover trust funds alleged to have been misappropriated through the negligent and fraudulent acts of respondent, Security Trust Company. Jurisdiction was based upon diversity of citizenship and amount. Each complaint alleged facts essential to the maintenance of a class action under Rule 23, Federal Rules of Civil Procedure, as then in effect, and pleaded rights independent of the class (R. 13, 261). Answers to the complaints, *inter alia*, admitted petitioners' diverse citizenship and the jurisdictional amount involved. Both cases were at issue on the pleadings at March 7, 1966 (R. 76, 285).

During June 1966, respondent's counsel began corresponding directly with all members of the class not named as parties (R. 107). Upon immediate notice to cease (R. 105) respondent's counsel, by reply, challenged any jural relationship between counsel for petitioners and members of the class not named as parties (R. 105-106). Petitioner immediately moved for a protective order (R. 101). After hearing thereon, the District Court entered an order dated September 14, 1966 (hereinafter September Order) which was to become the genesis for the subsequent order of dismissal with prejudice (R. 176 at 179). Paragraph 1 of the September Order read:

> "1. Plaintiffs shall within ten (10) days hereafter amend their complaints so as to include as parties Plaintiff all members of the alleged class who have *retained*[5] counsel for Plaintiffs to represent them in these two cases."

The September Order further required the clerk to send notices to each member of the class, pursuant to Rule 23 (c) (2), as amended July 1, 1966. Under the terms and conditions of the notice sent by the clerk (R. 188),

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[5] Emphasis ours.

members of the class were given the following alternatives in addition to the right to remain inactive class members:

1. Exclusion, if requested in writing before October 28, 1966, or,

2. The right to participate actively as a party by filing their appearance with the clerk on or before October 28, 1966.

The class members were advised in the notice that the judgment, whether favorable or not, included all members who did not request exclusion. The notice also advised each member, "You have an interest in the outcome of this litigation" (R. 188).

Motions to amend the September Order by eliminating Paragraph 1 therefrom, for leave to file an interlocutory appeal, for modification of the September Order and for writ of prohibition from the Court of Appeals were denied (R. 182, 183, 187, 191, 209, 210, 215).

On May 9, 1967, the complaints were amended *pursuant to the September Order* by adding as named parties plaintiff seven additional corporate members of the class (R. 221).

Counsel for petitioners filed an affidavit of compliance with the September Order by July 1[illegible], 1967 (R. 228). No counter-affidavits were filed by the respondent.

As of May 9, 1967, in accordance with the terms and conditions of the notice to members of the class, the composition of the class was as follows:

1. Three corporate members, including one Florida domiciliary, requested exclusion in writing (R. 209-212);

2. Thirty corporate members, including three Florida domiciliaries, and 1,521 individuals had elected to be included as members of the class without becoming named parties or actively participating in these actions (R. 228);

3. Nine corporate members of the class were named as parties plaintiff and were the active class participants (R. 228).

On May 18, 1967, respondent filed its motion to dismiss, upon the ground that petitioner's failure to name as parties plaintiff the *four* Florida domiciliary companies, who were members of the class, constituted a palpable attempt to circumvent the September Order and was a failure to comply therewith (R. 226). Respondent's motion to dismiss was predicated upon its allegation that petitioners' counsel had been *retained* by the Florida companies and petitioners had represented to the District and Circuit Court that such retainer had been made (R. 226). The Record contains no such representation by petitioners or their counsel. It does contain the direct opposite—that counsel for petitioners were *not* retained by the Florida companies (R. 258 and 228). The only position of counsel for petitioners was that all members of the class were *represented* by him through his *retention* by the original named parties plaintiff (R. 242).

On July 12, 1967, the District Court entered an order dismissing both causes with prejudice, pursuant to Rule 41 (b), for petitioners' failure to join the *three* Florida corporations (R. 229). No notice of dismissal was given to members of the class (R. 231). The joinder of these corporations would per force destroy federal jurisdiction as their citizenship is the same as that of respondent (R. 12). There is no challenge of petitioners' ability to fairly and adequately represent the class and there is no finding by the District Court on this point in the Record. The Record contains no finding that the Florida corporations are indispensable parties.

The District Court correctly stated the provision of paragraph 1 of the September Order in the first paragraph of the order of dismissal (R. 229). However, in the second paragraph of the order of dismissal the District Court

bases the dismissal upon petitioners' failure to perform a condition which did not exist in the September Order, i. e., that petitioners failed to amend the complaints to include as parties members of the class *represented* by counsel for petitioners (R. 229, 230).

On July 17, 1967, pursuant to Rule 59, petitioners filed motions to reconsider, amend or vacate the order of dismissal (R. 231) which motions were denied July 28, 1967 (R. 259).

An appeal to the Court of Appeals for the Fifth Circuit followed and on June 28, 1968, the Court of Appeals affirmed the dismissal but vacated that portion of the order making the dismissal with prejudice (CCA-R. 446-447).

Timely petition for rehearing, suggestion for rehearing en banc and alternative motion for modification and clarification of the Circuit's June 28 opinion were filed and on August 29, 1968 were denied (CCA-R. 513-514).

The Court of Appeals refused to modify its June 28 opinion, notwithstanding that the Florida statute of limitations had run against the filing of another suit by Petitioners, or any of them, against the respondent (CCA-R. 514).

REASONS FOR GRANTING THE WRIT.

Conflict of Decisions.

The decision of the court below is in direct and irreconcilable conflict with the principles announced by this Court in *Provident Tradesmens Bank and Trust Co. v. Patterson,* ... U. S. ..., 19 L. Ed. 2d 936, 88 S. Ct. ... (1968). In a unanimous opinion, in *Provident,* this Court reversed the Court of Appeals for the Third Circuit for its inflexible application of Rule 19. In its application of Rule 23 in the cases at bar, the Court of Appeals for the Fifth Circuit has

imposed a construction of the Rule so rigid and so harsh that the Rule now constitutes a procedural trap to litigants otherwise entitled to the use of a class action device in the redress of wrongs done them. In addition, the Circuit callously disregarded the rights of 1560 litigants by specifically refusing to consider the alternative procedures, provided by this Court under the Federal Rules, which are designed to preserve such rights.

This Court left nought to chance on how the Federal Rules of Civil Procedure were to be construed—"They shall be construed to secure the just, speedy and inexpensive determination of every action."[6]

The decision of the Fifth Circuit in these cases has eliminated Rule 23 from being construed in accordance with the provisions of Rule 1. The Circuit has further eliminated Rules 19 and 20 from being used in aid of federal jurisdiction and has cast aside the saving provisions of section (d) (4) of Rule 23 in direct violation of a litigant's right to an adjudication upon the merits of claims independently pleaded from the rights of the class of which he is a member.

Federal Rules of Civil Procedure are not islands unto themselves but are the mainland of federal procedure and must be construed and applied in *pari materia* and, while the gravamen of the error is a perversion of Rule 23, the rejection of the commands in Rule 19 has resulted in defeating independent claims as well as those of the class.

The involvement of Rule 19 as an integral part of the duties imposed upon the lower courts, in these cases, may very well result in the judgment complained of being in direct conflict with the decision of the *Provident* case, in addition to its being in conflict with the principles announced therein.

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[6] Rule 1, F. R. C. P.

The principles which this Court considered essential to a proper determination of questions of joinder and indispensability, under Rule 19, in *Provident* have not been complied with in the instant cases and every requirement contained in amended Rule 23 was disregarded by both courts below, with the exception of the notice provision of section (c) (2). The resulting challenge to the scope of amended Rule 23 is, therefore, substantially greater than in *Provident* because of the adverse affect upon innocent members of a class. Although petitioners called *Provident* to the attention of the Court of Appeals,[7] it was to no avail. The opinion of the Court of Appeals[8] in *Provident* is some 24 pages long and provided this Court with the thinking and analysis at the circuit level. In stark contrast, the opinions of the Court of Appeals in the instant cases are *per curiam*, two paragraphs in length and provide no insight into the considerations, if any, given by the circuit to the issues raised on appeal.

The analysis to be conducted by lower courts in properly safeguarding the rights of litigants, through the application of federal rules, as announced by this Court in *Provident,* is completely absent from the instant cases.

There was no determination that the parties of record did not fairly and adequately represent the class. There was no determination that the joinder of the companies demanded by the lower court involved indispensable parties. There was no determination that the actions could be maintained as class actions. There was no order entered requiring the elimination from the complaints of allegations as to the representation of absent members. There was no notice to the class of the proposed final dismissal.

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[7] CCA-R. 496-97.

[8] 365 F. 2d 802 (3rd Cir. 1966).

Essential and prerequisite to the dismissal of class actions under Rule 23, as amended, is a finding by the lower court that questions of law or fact common to the class do *not* predominate over questions affecting individual members, that the class action is *not* superior to other available methods for a fair and efficient adjudication of the controversy, that the interest of the members of the class controlling the prosecution of the action is *not* substantial or significant, that there is *not* other litigation pending by members of the class the extent and nature of which would render the federal action unfeasible, that it is *not* desirable to concentrate the litigation of claims in the federal forum and that the management of the class is one which *cannot* feasibly be undertaken. None of these findings exist in the instant case and, presumably, the Court of Appeals has abolished these requirements.

The only consideration given, by either the district court or the Court of Appeals, to Rule 23 was the use of the notice provision through which the district court created a legal smoke screen and into which the as yet unlitigated claims of 1560 litigants disappeared.

No consideration whatsoever was given to the total absence of any other remedy than the instant suits for the claims of the parties of record and those of the class. The court of appeals in its August 29, 1968 *per curiam* opinion summarily rejected any consideration of the statute of limitations having run.

Each of the above omissions was given careful consideration by this Court in *Provident,* and this Court specifically stated that an examination of the controversy was to be made in accordance with the analysis required under the pertinent Rule.

There is no dearth of law at any federal level outlining the proper application of the Rules. Classic in its approach, fair in its application and just in its effect is the

class action procedure involved in *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 43 F. R. D. 452 (E. D. Pa. 1968) which demonstrates the manner in which this Court has commanded the federal Rules be applied, as opposed to the application by the lower courts here.

Counsel can find no case in the Fifth or any other Circuit where a dismissal, at a time when limitations had run against the bringing of further actions, was enforced under so bizarre a circumstance as here exists. Cases before the Fifth Circuit involving any element of the issues raised in these actions were decided exactly opposite from the decisions reached here[9] and in a case virtually on all fours[10] the Fifth Circuit reached an opposite conclusion from that in the instant cases.

The decision of the Fifth Circuit is in conflict with decisions of the Second Circuit,[11] the Eighth Circuit[12]

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[9] *Tardan v. California Oil Company*, 323 F. 2d 717 (5th Cir. 1963), held if diversity was destroyed by additional joinder, court must afford any relief available to existing parties.

Standard Oil Company of Texas v. Marshall, 265 F. 2d 46 (5th Cir. 1959), held court could not dismiss action without finding absent parties were indispensable.

Humphrey v. Standolind Oil and Gas Company, 232 F. 2d 925 (5th Cir. 1956), reversed a dismissal with prejudice entered for plaintiff's failure to join additional parties.

Keene v. Hale Halsell Co., 118 F. 2d 332 (5th Cir. 1940), reversed a decree which extinguished rights merely because of nonjoinder.

[10] *Mackintosh v. Mark's Estate*, 225 F. 2d 211 (5th Cir. 1955), held district court in error for ordering joinder of parties whose joinder would defeat jurisdiction.

[11] *Eisen v. Carlisle & Jacquelin*, 370 F. 2d 119 (2nd Cir. 1966), cert. denied 386 U. S. 1035, 87 S. Ct. 1487, 18 L. Ed. 2d 598 (1967), and *Eisen v. Carlisle & Jacquelin*, 391 F. 2d 555 (2nd Cir. 1968), remanded for full evidentiary hearing on prior findings of the district court noting that dismissal for lack of adequate representation could not be reconciled with the letter or the spirit of the new Rule.

[12] *Reynolds v. Wabash Railroad Company*, 236 F. 2d 387 (8th Cir. 1956), held: Rules not intended to permit a district court on its own initiative to require bringing in parties which would deprive the court of jurisdiction.

and the Ninth Circuit[13] which petitioners believe to correctly enunciate class action and joinder procedure.

Necessity for Exercising the Supervisory Powers of This Court.

A threshold issue must be decided before entering a discussion of the intended application of Rule 23, as amended; the right of the class to notice of dismissal. The old Rule required notice to members of the class of dismissal of "true" class actions[14] because any judgment was binding upon absent members of the class, while leaving such notice discretionary with the court in the "hybrid" and "spurious" class actions[15] where the judgment only bound the parties actually before the court. The abolition of the categories or labels of class actions, by the 1966 amendment to Rule 23, in conjunction with the binding effect of judgment on all members of the class under the new Rule makes notice of dismissal mandatory in all cases and the Rule so provides, leaving only the manner of the notice to the discretion of the court.

Rule 23 had not been amended when the instant suits were filed and no determination of their maintainability as class actions was then required by the court, other than an examination of the complaints which met the Rule requirements. After the effective date of the 1966 amendment to Rule 23, neither the District Court nor the Court of Appeals made the requisite determination that the

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[13] *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F. 2d 909 (9th Cir. 1964). Any deficiency in a class action pleading is subject to correction by amendment and dismissal can only affect absent members of the class.

[14] One of the instant cases is a "true" class action, having been brought by certain members of the class on behalf of themselves and of the Treasurer of the State of Florida, Receiver of McKinley & Company.

[15] One of the instant cases is both "hybrid" and "spurious."

actions were maintainable as class actions, although all factors essential to such determination were before both lower courts. By the terms of the September Order, *supra*, Petitioners were required to join as parties plaintiff all members of the class who had *retained* the law firm of Blackwell, Walker & Gray to represent them. Such an order constitutes a radical departure from the empirical application of any joinder rule, however, failing to maintain relief from the Order, plaintiffs amended in compliance with the Order. Thereafter, the District Court sought to enforce joinder of three Florida corporations, who were the only non-diverse members of a class of 1560, upon the mistaken and unprecedented ground that they were *represented* by the same attorneys as the named plaintiffs. No rule or law exists which requires a party to join others who neither authorized their joinder nor retained counsel for that purpose, absent a finding that indispensable parties have been omitted or that the parties of record do not fairly and adequately represent the class.

Rule 86 requires the application of amended Federal Rules of Civil Procedure to further proceedings in pending cases, after the effective date of the amendment, absent a specific finding by the court that to apply the Rule as amended would not be feasible or would work an injustice. No such finding with respect to the instant cases was made by the district court with respect to the July 1, 1966 amendment to Rule 23. Of what character then is an action under Rule 23, as amended, before the court determines by order that it is to be maintained as a class action? At the very least it must be considered a proceeding under Rule 20 subject to the application of Rule 19 with respect to joinder, loss of diversity of citizenship and retention *vel non* of federal jurisdiction.

After the institution of an alleged class action, its subsequent failure to meet the Rule 23 tests of main-

tainability is procedural and not jurisdictional and any pleaded claims of parties of record may proceed as though the action were one originally instituted under Rule 20.

A proceeding under Rule 20 invokes the provisions of Rule 19 with respect to joinder, indispensability and ultimate federal jurisdiction. Under Rule 19, failure to join an indispensable party warrants dismissal only after a consideration by the court of the factors contained in the Rule, most important of which is "Whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder." Here the district court is called upon to safeguard by careful consideration the rights of the parties of record. How much greater is the circumspection with which a court must in equity and good conscience evaluate and protect the rights of absent parties when dismissal is contemplated under Rule 23? Certainly notice of dismissal to the absent members is the minimum standard of acceptable procedure, particularly where the district court has previously advised the absent persons that they are part of a class who have an interest in the outcome of the litigation. To allow dismissal without notice to the absent persons under such circumstances is to convert Rule 23 into a legal spring gun, which may at any moment and without notice extinguish property rights of the absent. The equity of such notice is clear. Absent members of the class, other than the three Florida corporations, could have joined as parties plaintiff and preserved their claims independent of their rights as a class. All absent members were diverse citizens, except the three members whose joinder the district court sought to enforce, and federal jurisdiction would have been retained.

The Achilles' heel of Rule 23 lies in the interim period between institution of a suit and court determination of its maintainability as a class action. Under the old Rule where class actions were determined from the face of

the pleadings, subsequent joinder, substitution or intervention by members of the class non-diverse to the defendant did not affect federal jurisdiction. Under the new Rule, joinder or substitution of non-diverse parties would defeat federal jurisdiction upon a subsequent determination by the court that the suit could not be maintained as a class action. Therefore, joinder of non-diverse members of a class prior to a Rule 23 (c) determination imperils the jurisdiction of the federal court and the substantive rights of the parties. The natural and logical sequence of the proceedings, to avoid the foregoing consequences, dictate that there must be first a determination that the parties fairly and adequately represent the class. Thereafter, the court should determine the existence of any non-diverse members of the class whom the court considers indispensable parties. If at that juncture the court determines that the suit may proceed as a class action upon joinder of the indispensable parties, the order of maintainability as a class action should *first* be entered and then joinder of the indispensable parties required as a condition subsequent to the maintainability of the class action. To proceed in this manner would preserve federal jurisdiction because actions once determined to be class actions cannot be divested of federal jurisdiction by the subsequent joinder or substitution of additional non-diverse members of the class. Thus, the mechanics of preserving federal jurisdiction was within the power of the lower court. The continued application of a Rule of federal procedure which produces a result opposite from that intended by this Court is a condition of sufficient magnitude to warrant invoking the supervisory power of this Court over Circuit Courts of Appeal to the end that litigants are not denied their day in court and their rights summarily foreclosed by final dismissal at early pretrial stages.

The extreme futility of the action of the Court of Appeals in remanding the cases for entry of an order

of dismissal without prejudice is quite clear. The Court of Appeals, upon petition for rehearing, rehearing en banc and for modification and clarification of their June 28 opinion declined to rehear and specifically refused to modify their previous opinion to provide for the dismissal to stand but with leave to amend, which would permit an amended complaint, pursuant to Rule 15, to date from the filing of the original complaint and thus bar the defense of limitations. Seldom has a more cavalier approach been taken by a court of appeals.

Rule 23 as applied in these cases, and as approved by the Court of Appeals, manifests in every respect the objections and admonitions of Mr. Justice Black in dissenting to the amendments to the Rules[16] and in suggesting the addition of paragraph (c)[17] to Rule 41 as a means of preventing the denial of due process evidenced by the rigid application of Rule 23 as now condoned by the Fifth Circuit.

It is not uncommon that counsel for a moving party may be retained by and represent an entire class and the nature of the claims are such that a class action is superior to any other form of action and otherwise meets the requirements of Rule 23. If such condition exists, then,

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[16] 39 F. R. D. 272. "* * * The confusion created by the adoption of the present rules, over my objection, has been partially dispelled by judicial interpretations of them by this Court and others. New rules and extensive amendments to present rules will mean renewed confusion resulting in new challenges and new reversals and prejudicial 'pretrial' dismissals of cases before a trial on the merits for failure of lawyers to understand and comply with new rules of uncertain meaning."

[17] (c) "No plaintiff's case shall be dismissed or defendant's right to defend be cut off because of the neglect, misfeasance, malfeasance, or failure of their counsel to obey any order of the court, until and unless such plaintiff or defendant shall have been personally served with notice of their counsel's delinquency, and not then unless the parties themselves do or fail to do something on their own part that can legally justify dismissal of the plaintiff's case or of the defendant's defense."

under the interpretation applied by the District Court and approved by the Court of Appeals, all members of the class must be named as parties plaintiff and class actions collapse, not because of failure to meet requirements of the Rule but because of the selection of counsel, a circumstance which is unsupported by rule, case or statute.

If Rule 23 is to be applied as a Hobson's choice so as to permit lower courts, on pain of dismissal with prejudice, to enforce joinder of members of a class whose joinder would destroy federal jurisdiction, without any prior determination that the named parties do not fairly and adequately represent the interest of the class and without any finding that the members of the class whose joinder is demanded are necessary and indispensable parties, then this Court should abolish Rule 23 in protection of the rights of litigants whose claims might otherwise be sued on and recovered in independent actions.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

SAMUEL J. POWERS, JR.,
and

GEORGE P. BOWIE,
Counsel for Petitioners.

In the
United States Court of Appeals
For the Fifth Circuit.

No. 25,249.

Transit Casualty Company, et al.,
Appellants,

versus

Security Trust Company, et al.,
Appellees.

Appeals from the United States District Court for the Southern District of Florida.

(June 28, 1968.)

Before Wisdom and Coleman, Circuit Judges, and Comiskey, District Judge.

Per Curiam: The appellants brought this suit as a class action. Before the court reached a determination of appellants' right to maintain this suit as a class action, the district judge ordered appellants to "amend their complaints so as to include as parties plaintiff all members of the alleged class who have retained counsel for the plaintiffs to represent them in these two cases." Ten months later the district judge dismissed appellants' suit with prejudice when appellants failed to comply with this order. Rule 41(b) F.R.Civ.P.

We agree with the order of dismissal by the district court, but vacate that part of the order making the dismissal with prejudice and remand with instructions to enter the order without prejudice.

CORRECTED
in the
United States Court of Appeals
for the Fifth Circuit.

No. 25,249.

Transit Casualty Company, et al.,
Appellants,

versus

Security Trust Company, et al.,
Appellees.

Appeals from the United States District Court for the Southern District of Florida.

(August 29, 1968)

ORDER ON PETITION FOR REHEARING.

Before Wisdom and Coleman, Circuit Judges, and Comiskey, District Judge.

Per Curiam: Appellants filed a Petition for Rehearing and alternative Motion for Modification and Clarification of the June 28, 1968 Per Curiam of this Court.

For rehearing, appellants urge two principal points, both of which deal again with the merits or demerits of the District Court's order in attempting to define the

parties to be included within the appellant's class action. Again appellants overlook that really the only issue on appeal is the compliance vel non with the District Court's order of September 14, 1966, and, having found a failure of compliance on the part of appellants, the District Court's judgment of dismissal was affirmed with directions that the order be entered without prejudice as set out in our Per Curiam of June 28, 1968. This Court will not modify its previous ruling despite any Florida law claimed by appellants which may or may not bar a subsequent cause of action in any future suit.

It is therefore ordered that appellant's Petition for Rehearing and alternative Motion for Modification and Clarification of our June 28, 1968 Per Curiam are denied, and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12), the Petition for Rehearing En Banc is Denied.

United States Court of Appeals
for the Fifth Circuit.

October Term, 1967.

No. 25,249.

D. C. Docket No. Civ. 66-105 and 66-177A (Consolidated)

Transit Casualty Company, et al.,
Appellants,

versus

Security Trust Company, et al.,
Appellees.

Appeals from the United States District Court for the Southern District of Florida.

Before Wisdom and Coleman, Circuit Judges, and Comiskey, District Judge.

JUDGMENT.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, vacated in part and affirmed in part and that this cause be, and it is hereby remanded to the District Court with instructions to enter the order of dismissal without prejudice;

It is further ordered and adjudged that the appellants, Transit Casualty Company, and others, be condemned to pay one-half of the costs in this Court, and appellees, Security Trust Company, and others, be condemned to pay one-half of said costs, all of which has been executed out of the said District Court.

June 28, 1968

Court Costs:

Docketing cause, etc.....$25.00

Issued as Mandate: Sep. 6, 1968.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 742

TRANSIT CASUALTY COMPANY, et al.,
Petitioners,

vs.

SECURITY TRUST COMPANY, et al.,
Respondents.

BRIEF OF RESPONDENT SECURITY TRUST COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Attorneys for Respondent
Security Trust Company

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IN THE

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OCTOBER TERM, 1968

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TRANSIT CASUALTY COMPANY, et al.,
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vs.

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Respondents.

BRIEF OF RESPONDENT SECURITY TRUST COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment below of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Order of Dismissal of the United States District Court for the Southern District of Florida is unreported, but appears at R.* 229-231. Petitioners appealed to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals' initial opinion is reported at 396 F.2d

*"R" refers to the printed record in the Court of Appeals.

803; its uncorrected opinion on Petition for Rehearing En Banc is reported at 399 F.2d 665; and its corrected Order on Petition for Rehearing is not yet reported, but appears at A2-A3 of the Appendix to the Petition.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1). The original opinion of the Court of Appeals is dated June 28, 1968. Petitioners' timely petition for rehearing was denied on August 29, 1968.

QUESTION PRESENTED

Was it error to dismiss petitioners' complaints without prejudice for failure to obey a court order under the following circumstances:

The named petitioners filed two diversity damage actions in the district court below alleging that the suits were brought in their own behalf and on behalf of alleged classes consisting of certain insurance companies and other insurers; the members of the alleged classes who were of the same citizenship as respondent were not named as parties plaintiff; during the trial proceedings, the district court ordered plaintiffs to amend their complaints "so as to include as parties plaintiff all members of the alleged class who have retained counsel for the plaintiff to represent them in these two cases;" when this order was not complied with, the district court dismissed both cases with prejudice for failure to obey a court order; plaintiffs then appealed to the Court of Appeals, which vacated the "with prejudice" part of the dismissal and remanded the cases for entry of a dismissal without prejudice?

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Federal Rule of Civil Procedure 41(b) provides:

"**(b) Involuntary Dismissal: Effect thereof.** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

STATEMENT OF THE CASE

Petitioners, as plaintiffs below, filed two suits in the United States District Court for the Southern District of Florida (R. 12-75, 261-284). The complaints sought to recover damages from the respondent, Security Trust Company, because of the latter's alleged mismanagement of McKinley & Company. McKinley & Company was alleged to have gone insolvent after entering into separate management agreements to act as manager for various insurers in the writing of certain types of insurance.

The named plaintiffs in each case were foreign insurance companies authorized to do business in Florida. In each case, plaintiffs sued "to their own use and to the use of" certain other insurers similarly situated (R. 12-13, 261-262). After some preliminary procedural sparring had occurred, the district court entered an order on September 14, 1966, which provided in pertinent part:

> "1. Plaintiffs shall within ten (10) days hereafter amend their complaints so as to include as parties Plaintiff all members of the alleged class who have retained counsel for the Plaintiffs to represent them in these two cases." (R. 179).

Events Leading Up To Order Of September 14, 1966

The events leading up to the order of September 14, 1966, are shown at R. 76-175. These events are fairly summarized in TRANSIT CASUALTY COMPANY v. ATKINS, (5th Cir. 1967), 372 F.2d 441, 441-442, where the Court of Appeals declined interlocutory review of the order, stating:

"The facts underlying both of these proceedings are: The complaints were brought by two named parties plaintiff and seek damages against Security Trust Company, not only for themselves, but presumably for the benefit of 24 other insurance companies allegedly similarly situated. The complaints did not state in what way the class members were so numerous that joinder of all was impracticable; nor was it alleged what questions of law or fact were common as between the defendant, Security Trust Company, and all the quasi plaintiffs; nor was it shown how a class action was superior to other available methods for the fair and efficient adjudication of the controversy. Security Trust, in its answers, specifically denied all allegation as to the alleged class claimed to be represented; denied that it was impracticable to bring all of the alleged members of the class before the court; and denied that the two party plaintiffs fairly represented the interests of the entire class. In the course of discovery, after answers were filed, the attorneys for Security communicated by letter with some of the 24 absent members of the alleged class seeking information as to their knowledge of having been named as members. The communications also concerned the taking of discovery depositions. Thereupon, the attorneys for the plaintiffs notified Security's counsel to cease and desist communicating directly or indirectly with the clients represented by them. They filed before the district judge a motion to enjoin and prohibit any such communication, and in that motion charged counsel for defendant with unethical conduct in attempt-

ing to communicate directly with the absent members of the class. Presented with a claim by the attorneys for the p'aintiffs that the attorney-client relationship existed between them and the non-party class members, and a charge of unethical conduct leveled at counsel for defendant, the Court had the problem of determining the jural relationship of the members of the class, not only to the plaintiffs but to each other, and to the subject matter of the litigation, as well as to the counsel for plaintiffs. In an apparent effort to assemble information to assist him in determining these relationships, the District Judge entered the order of September 14th. Plaintiffs argue that the writs should issue because the order requires the joinder of additional plaintiffs who are residents of the same state as the defendants, and that this will destroy diversity and will divest the federal court of jurisdiction.

Irrespective of the correctness of the order below, it is apparent that this case is not in an appropriate stage for appellate review. The District Court is in the middle of a housekeeping operation. It has not reached a determination of the merits in any respect, and the order here sought to be reviewed does not define the rights of any party. It is not clear what the precise effect of the order will be on the outcome of the litigation, nor what subsequent steps the court will take. Only the subsequent decree, either dismissing the case or permitting them to proceed as a class action, will define their rights. . . . "

District Court Proceeding After Denial of Interlocutory Appellate Review

After the Court of Appeals held it had no jurisdiction to review the interlocutory order, the district court granted petitioners additional time to comply with the order (R. 185-186). Finally, on May 9, 1967, petitioners amended their complaints in supposed compliance with the September 14th order, but merely added certain foreign corporations as named plaintiffs and named none of the Florida corporations they admittedly represented (R. 221-223). To add insult to injury, plaintiffs' counsel filed an affidavit to the effect that the unnamed Florida members of the class had "elected to remain in that capacity" (R. 228).

The Dismissal With Prejudice for Failure to Obey The Court's Order

The district court's Order of Dismissal provides in pertinent part as follows:

> " . . . 2. Notwithstanding the granting of two continuances to the plaintiffs to comply with the order of September 14, 1966, plaintiffs, in the opinion of this Court, have failed to comply therewith. The Amendment to the Complaint filed on May 9, 1967 in an effort to comply with the order of September 14, 1966, conspicuously fails to include three Florida corporations which the plaintiffs have represented to this Court, as well as the Appellate Court—the Fifth Circuit Court of Appeals—to comprise members of the alleged class which must be named pur-

suant to the Order of September 14, 1966, since they were legally represented by counsel for the plaintiffs. As argued by counsel for the defendant, a failure to name these corporations constitutes a failure to comply with the order of September 14, 1966.

3. This Court expressly notes that at the time of the hearing on this motion no determination had been made as to whether this action is properly maintainable as a class action. In this regard, the posture of this case at the time of the hearing was the same as when the order of September 14, 1966 was entered. This Court, then, as now, as noted by the Fifth Circuit Court of Appeals, was engaged in a 'housekeeping' operation with a view to determining whether this action is properly maintainable as a class action. A full and good faith compliance with the order of September 14, 1966 was also necessary in order for this Court to determine the jural relationships of all interested parties among themselves as well as their relationship to the subject matter of the litigation and discovery processes incident thereto.

4. The Amendment together with counsel's affidavit of compliance does not respond to the Court's order of September 14, 1966 and instead of facilitating a disposition of the matters set forth in the complaint it serves to frustrate and hamper this Court's effort to resolve the pertinent issues.

5. The Court expressly finds that the plaintiffs have failed to comply with the order of September 14, 1966 as they were ordered to do. It Is Therefore, Ordered And Adjudged, that this cause be and the same is hereby dismissed with prejudice pursuant to Rule 41(b) and that the Defendant, Security Trust Co. go hence without day with its costs as may hereafter be taxed upon motion. . . . " (R. 229-231).

Court of Appeal's Ruling That Dismissal Should Be Without Prejudice

In its initial opinion at 396 F.2d 803, the Court of Appeals states:

" . . . We agree with the order of dismissal by the district court, but vacate that part of the order making the dismissal with prejudice and remand with instructions to enter the order without prejudice."

In its Order on Petition for Rehearing at 399 F.2d 665, the Court of Appeals states:

" . . . For rehearing, appellants urge two principle points, both of which deal again with the merits or demerits of the District Court's order in attempting to define the parties to be included within the appellants' class action. Again appellants overlook that really the only issue on appeal is the compliance vel non with the District Court's order of September 14, 1966, and, having found a failure of compliance on the part

> of appellants, the District Court's judgment of dismissal was affirmed with directions that the order be entered without prejudice as set out in our Per Curiam of June 28, 1968. This Court will not modify its previous ruling despite any Florida law claimed by appellants which may or may not bar a subsequent cause of action in any future suit. . . . "

Having had their cases dismissed without prejudice for failure to obey a court order, petitioners now seek review in this Court by petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

1. The decision below is not in conflict with any decision of another Court of Appeals. Dismissals without prejudice for failure to obey a court order are expressly authorized by both Rule 41(b) and numerous federal decisions. Cf., 5 MOORE'S FEDERAL PRACTICE, Section 41.12, and cases there collected.

2. The decision below is correct and in probable accord with this Court's prior decisions. Compare: LINK v. WABASH R. CO., 370 U.S. 626. The orderly administration of justice would be replaced by complete anarchy if litigants could, with complete impunity, simply disregard all Court orders deemed erroneous. Cf., WALKER v. CITY OF BIRMINGHAM, 388 U.S. 307; CARROLL v. PRESIDENT AND COMMISSIONERS OF PRINCESS ANNE, __ U.S. __.

3. None of the questions petitioners purportedly raise are properly before the Court on the present record. All four questions "presented" in the petition relate to joinder under Rule 19 and class action procedure under

Rule 23. None of these matters were considered by the courts below because petitioners never complied with the September 14th order of the district court. Since petitioners now assert a denial of due process, it should be noted in passing that these constitutional issues were never raised in the lower courts.

4. Supreme Court Rule 23(4) provides:

> "The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

Petitioners have not stated the "Questions Presented" with the required "accuracy, brevity, and clearness". Nor have they accurately or fairly stated the facts. While they now claim their lawyers were never "retained by the Florida companies" and that such companies did not have to be named under the September 14th order (Petition, p. 7), they admitted the exact opposite in both the district court (R. 253, 229-230), and in the court of appeals below. At page 2 of their Brief for petitioner in the mandamus and prohibition proceeding before the court of appeals, the present petitioners stated:

> "On September 14, 1966, the trial Court sua sponte entered an order requiring that the complaint be amended so as to add as additional parties plaintiff all members of the class who have retained counsel for the plaintiffs to represent them in the case (Exhibit C). It is undisputed that four (4) of the companies whose joinder would be required under this ruling are Florida corporations." (R. 225-226).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

JAMES A. DIXON
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and

SAM DANIELS
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Miami, Florida 33131

Attorneys for Respondent
Security Trust Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that in accordance with Supreme Court Rule 33, true copies of the foregoing were mailed to the attorneys for petitioners, SAMUEL J. POWERS, JR., ESQUIRE, First Federal Building, Miami, Florida 33132; and GEORGE P. BOWIE, ESQUIRE, 901 Washington Avenue, St. Louis, Missouri 63178, this _____ day of November, 1968.

_____

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 742

TRANSIT CASUALTY COMPANY, et al., Petitioners,

v.

SECURITY TRUST COMPANY, et al., Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

REASON FOR REPLY

Counsel for respondent, Security Trust Company, in their argument have misrepresented to this Court the Record below.

In the Brief in Opposition (p. 11), respondent tells this Court that denial of due process and the constitutional issues raised in the questions presented were never raised in the lower courts—this is false. Petitioners raised denial of due process on initial appeal. On petition for re-

hearing, on suggestion for rehearing en banc and by permission of the Court of Appeals specially granted (CCA-R. 471) denial of petitioners' right to equal protection and due process of law was, respectively, raised, briefed and argued in the lower court (CCA-R. 457, 461, 486, 487).

Respectfully submitted,

SAMUEL J. POWERS, JR.

and

GEORGE P. BOWIE
Counsel for Petitioners